STATE OF MICHIGAN

COURT OF APPEALS

ALKEN-ZIEGLER, INC., Plaintiff-Appellant,	UNPUBLISHED March 9, 2006
v	No. 264513 Kent Circuit Court
GEORGE BEARUP, and SMITH, HAUGHEY, RICE & ROEGGE, P.C., Defendants-Appellees.	LC No. 05-003989-CZ

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

In this action alleging legal malpractice, breach of contract, and breach of fiduciary duty, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm.

In 1994, plaintiff filed suit against Waterbury Headers Corporation for breach of contract and breach of implied warranty. Defendants[1] represented plaintiff in the Waterbury Headers matter. A default judgment was entered against Waterbury Headers, which was ultimately affirmed by the Michigan Supreme Court. However, because Waterbury Headers no longer maintained a presence in Michigan, plaintiff retained a Connecticut law firm to sue in Connecticut state court to enforce the judgment. The Connecticut trial court determined that the Michigan courts lacked personal jurisdiction over Waterbury Headers, and refused to enforce the Michigan default judgment. Although defendants never appeared in the Connecticut action, they continued to monitor the litigation and to represent plaintiff in the Waterbury Headers matter until October 2002. Neither defendants nor the Connecticut law firm sought an appeal of the Connecticut court's ruling, and the time for appeal expired.

Plaintiff brought the instant action against defendants, claiming that they committed legal malpractice by failing to direct an appeal of the Connecticut trial court's order. In addition, plaintiff claimed that defendant Bearup had contractually agreed to instruct the Connecticut law firm to appeal the order. Finally, under a durable power of attorney that had been previously

[1] Defendant Bearup is an attorney affiliated with defendant law firm.

executed between defendant Bearup and plaintiff's owner, plaintiff claimed that Bearup breached his fiduciary duty by failing to direct an appeal of the Connecticut court's order. The trial court found that all three of plaintiff's claims sounded in legal malpractice, applied the two-year malpractice statute of limitations, and dismissed the claims as time-barred under MCR 2.116(C)(7).

The gravamen of a plaintiff's claims and whether those claims are time-barred by the statute of limitations are questions examined under MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). We review de novo a trial court's ruling on a motion for summary disposition brought under MCR 2.116(C)(7), considering all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Id*.

Plaintiff first argues that its legal malpractice claim was not time-barred because the malpractice statute of limitations had not yet begun to run. We disagree. "[T]he period of limitations is 2 years for an action charging malpractice." MCL 600.5805(6). A claim based on professional malpractice "accrues at the time that [the professional] discontinues serving the plaintiff in a professional or pseudoprofessional capacity *as to the matters out of which the claim for malpractice arose . . .*" MCL 600.5838 (emphasis added). Stated another way, a legal malpractice claim accrues "when [the defendant] last provided professional service for [the plaintiff] *in the underlying . . . matter*." *Gebhardt v O'Rourke*, 444 Mich 535, 541; 510 NW2d 900 (1994) (emphasis added).

The moving party has the initial burden to support its claim for summary disposition under MCR 2.116(C)(7) by admissible documentary evidence. *American Federation of State, Co and Municipal Employees v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Defendants submitted documentary evidence, including an affidavit and billing records, showing that they discontinued representing plaintiff in the Waterbury Headers matter on October 11, 2002. Thus, although they continued to represent plaintiff on other matters, the evidence indicated that defendants' services with respect to the matters out of which the claim for malpractice arose concluded in October 2002.

The burden then shifted to plaintiff to demonstrate the existence of a factual dispute regarding the timing of accrual. *Id*. However, plaintiff failed to present any documentary evidence showing that defendants' representation in the Waterbury Headers matter extended beyond October 11, 2002, thereby failing to establish a genuine factual dispute regarding when defendants' representation in the Waterbury Headers matter terminated. Because no factual dispute existed concerning the date of accrual, the trial court properly determined that defendants' services in the Waterbury Headers matter ended in October 2002. Plaintiff's legal malpractice claim, filed in April 2005, was time-barred by the two-year malpractice statute of limitations.

Plaintiff cites *State Bar of Michigan v Daggs*, 384 Mich 729, 732; 187 NW2d 227 (1971), *K73 Corp v Stancati*, 174 Mich App 225, 228-229; 435 NW2d 433 (1988), and *Basic Food Industries, Inc v Travis, Warren, Nayer & Burgoyne*, 60 Mich App 492, 496; 231 NW2d 466 (1975), for the proposition that a lawyer does not discontinue serving a client until relieved of that obligation by the client or the trial court. Thus, plaintiff argues that even if the last actions taken by defendants in the Waterbury Headers matter occurred in October 2002, defendants

never discontinued serving plaintiff in that matter because they were never officially relieved as counsel. While an attorney's representation of a client generally continues until the attorney is relieved of that obligation by the client or the court, *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002), an attorney may also discontinue serving a client "upon completion of a specific legal service that the lawyer was retained to perform." *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994); see also *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987). Moreover, once a specific legal task has been performed and a matter has been closed, follow-up activities by the lawyer will not revive or extend the period of service to the client. *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999).

As noted above, the documentary evidence showed that defendants' representation of plaintiff in the Waterbury Headers matter ended when they closed plaintiff's file and sent the final billing statement in October 2002. Plaintiff failed to present any documentary material to rebut or otherwise counter this evidence. Because defendants discontinued representing plaintiff in the Waterbury Headers matter in October 2002, their service on that specific issue terminated at that time, and no formal discharge was necessary. *Chapman*, *supra* at 561-562.

Plaintiff next argues that defendants breached their contractual duty to direct the Connecticut law firm to appeal the Connecticut court's ruling. Plaintiff asserts that this breach of contract claim is distinct from its malpractice claim, and that the trial court improperly dismissed it as time-barred under the malpractice statute of limitations. We disagree. "The gravamen of an action is determined by reading the claim as a whole." *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). "[C]laims against attorneys brought on the basis of inadequate representation sound in tort and are governed by the malpractice statute of limitations, even though a plaintiff may assert that the attorney's actions breached a contract." *Id*. Attorneys may be held liable under a contract theory, but only when it is shown that the attorney breached a "special agreement" rather than a general agreement to provide requisite skill or adequate legal services. *Brownell v Garber*, 199 Mich App 519, 524-526; 503 NW2d 81 (1993). A "special agreement" is a "contract to perform a specific act," as opposed to a general agreement "to exercise appropriate legal skill in providing representation in a lawsuit." *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984).

Plaintiff alleged in its complaint that "[t]here existed a contract between [plaintiff] and Bearup by which Bearup agreed to communicate any necessary information to [plaintiff's] Connecticut counsel in the Connecticut Action." Plaintiff asserts that under this alleged agreement, defendant Bearup was contractually obligated to direct the Connecticut attorneys to appeal the Connecticut court's adverse ruling. However, the specific language of the pleadings shows that this was not a "special agreement" to achieve a specific result, but rather an agreement to render adequate legal services during the course of the Connecticut enforcement action. Plaintiff's claim that damages flowed from defendants' failure to exercise the requisite degree of legal skill sounds in malpractice only. *Brownell*, *supra* at 525; *Barnard*, *supra* at 378. "The two-year [malpractice] statute applies to a legal malpractice action even when phrased as a breach of contract to render competent legal services." *Seebacher v Fitzgerald, Hodgman, Cawthorne & King, PC*, 181 Mich App 642, 646; 449 NW2d 673 (1989). The malpractice statute of limitations was thus properly applied to bar plaintiff's "breach of contract" claim. *Id*.

Finally, plaintiff argues that defendant Bearup breached his fiduciary duty, which was established under a general power of attorney executed between plaintiff's owner and defendant Bearup. Plaintiff asserts that the breach of fiduciary duty claim is distinct from the malpractice claim, and that the trial court improperly applied the malpractice statute of limitations. We disagree. The power of attorney document in this case granted Bearup broad powers to "commence, prosecute, enforce or to defend, answer, oppose, or confess all claims, suits, actions, or other judicial or administrative proceedings . . . ." While the grant of a general power of attorney forms a fiduciary relationship between the principal and the attorney-in-fact, *In re Susser Estate*, 254 Mich App 232, 235; 657 NW2d 147 (2002), the existence of an attorney-client relationship per se establishes an identical fiduciary relationship. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 514-515; 309 NW2d 645 (1981). Thus, defendant Bearup's fiduciary obligations under the power of attorney were not separate and independent of his status as plaintiff's attorney, but were duplicative of those already owed as plaintiff's lawyer.

Claims against attorneys brought on the basis of inadequate representation sound in malpractice only, and are governed by the malpractice statute of limitations regardless of the label they are given. *Aldred*, *supra* at 490. The fiduciary relationship created by the general power of attorney document merely contemplated that defendant Bearup would provide adequate legal services to plaintiff's owner. A similar fiduciary relationship already existed by virtue of Bearup's dual status as plaintiff's lawyer. *Fassihi*, *supra* at 514-515. Any claim arising out of the fiduciary relationship between plaintiff's owner and defendant Bearup sounded in legal malpractice only, and was subject to the two-year malpractice statute of limitations. *Aldred*, *supra* at 490.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood